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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 367

MARJORIE R. SKAHILL, as Administratrix of the Estate of JOHN J. SKAHILL, Deceased,

Petitioner,

—against—

CAPITAL AIRLINES, INC. and UNITED AIR LINES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the district court (App. A of Petition, pp. 1a-5a) is reported at 234 F. Supp. 906. The United States Court of Appeals for the Second Circuit affirmed the judgment of the district court without opinion at the conclusion of oral argument on April 20, 1965; its decision (App. B p. 8a) is not officially reported.

Jurisdiction

The jurisdictional requisites are set forth in the petition at page 2.

Questions Presented

1. Did the courts below properly interpret and apply the New York conflict of laws rule in enforcing a death

damages limitation of the *lex loci delicti* where New York had no contacts with the parties or subject matter of the action?

2. Did the enforcement of such death damages limitation, under the circumstances of this case, violate any provision of the United States Constitution?

Constitutions and Statutes Involved

The pertinent provisions are set forth in the petition at pages 2-3.

Statement of Facts

The facts involved are adequately set forth in the petition at pages 3-5.

ARGUMENT

I.

The Courts below properly interpreted and applied New York law.

The issue presented in this case was whether New York conflict of laws doctrine required the courts below to invoke New York public policy against death damages limitations and to refuse to enforce the death damages limitation of the *lex loci delicti* (Virginia).

The district court (affirmed without opinion by the United States Court of Appeals for the Second Circuit) decided:

1. That since New York concededly had no contact whatever with the action, except in its capacity as the forum, New York would not invoke its public policy, and would enforce the Virginia damages limitation; and

2. That the enforcement of the limitation in a case having no connection whatever with New York raised no constitutional problems.

The first part of the decision was a simple determination by the courts below of what the New York conflict of laws rule is—a determination which the lower courts were required to make under *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

This Court has stated many times that " . . . we accept and therefore do not review, save in exceptional cases, the considered determinations of questions of state law by the intermediate federal appellate courts . . ." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949).

This is not the "exceptional case" that the court should review. The petitioner seems to argue that the New York courts would apply the doctrine of *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 172 N.E. 2d 526 (1961), and would refuse to enforce the Virginia death damages limitation because New York applies its public policy regardless of whether or not it has any contact with the parties or the issues of the case.

This is clearly wrong. In the *Kilberg* case, the New York Court of Appeals was careful to emphasize that it was giving effect to New York public policy only because the decedent was a New York domiciliary, and the rationale of the decision was based upon the Court's concern to ". . . provide protection for our own State's

people." 9 N.Y. 2d at 39. The *Kilberg* rule was specifically limited "to our own domiciliaries. . . ." 9 N.Y. 2d at 40.

The case of *Davenport* v. *Webb*, 11 N.Y. 2d 392, 183 N.E. 2d 902 (1962), is mis-cited by the petitioner as supporting the proposition that the New York courts will not enforce foreign death limitations in any case. The question in *Davenport* was whether, in a case involving a New York resident, New York law or the *lex loci delicti* should govern the addition of prejudgment interest—which New York law allowed, but which Maryland law (*lex loci delicti*) did not. The New York Court of Appeals held that on that issue the *lex loci* governed, and prejudgment interest was not allowed.

Petitioner's contention that the New York courts, in cases involving "public policy", do not consider New York's interest in or contacts with the issues, is demolished by recent decisions of the New York Court of Appeals. Thus in *Babcock* v. *Jackson*, 12 N.Y. 2d 473, 480, 191 N.E. 2d 279 (1963), the Court of Appeals noted that:

> "Although the *Kilberg* case did not expressly adopt the 'center of gravity' theory, its weighing of the contacts or interests of respective jurisdictions to determine their bearing on the issue of the extent of the recovery is consistent with that approach."

Most recently the same court stated that: "In *Kilberg, supra*, the court emphasized the significant contacts which New York State had with the case." *Dym* v. *Gordon*, 16 N.Y. 2d 120, 126, — N.E. 2d — (1965). In that case a New York domiciliary injured in an automobile accident in Colorado sued the driver of the car in which he was riding, who was also a New York domiciliary. Colorado has a so-called "guest statute" which would prevent recovery. New York has no such statute, and in fact has what the Court described as a "policy of compensation for innocent tort victims." The precise question was whether the

policy of New York or of Colorado should prevail. The majority examined the interests of the two states and came to the conclusion that Colorado's interest was predominant, that Colorado law and policy should be applied, and that New York law and policy must yield. The dissenters felt that New York's contacts were predominant; even they did not suggest the application of New York public policy in the absence of any New York contacts whatever.

Petitioner's distorted interpretation of *Mertz* v. *Mertz*, 271 N.Y. 466, 3 N.E. 2d 597 (1936), adds no support to her argument. In *Mertz*, the issue was whether a wife could sue her husband in New York for personal injuries arising out of a tort committed in Connecticut, which permitted such suits between spouses. New York law denied the right of a wife to sue her husband under such circumstances. The Court of Appeals held that since the husband and wife both resided in and were married in New York, New York law applied. In the more recent case of *Intercontinental Hotels Corp.* v. *Golden*, 15 N.Y. 2d 9, 16, 203 N.E. 2d 210 (1964), the Court of Appeals characterized *Mertz* as a precursor of its "significant contacts" rule for choosing the law applicable to actions for torts occurring outside New York. From an examination of these cases, it is clear that New York applies its public policy *only* where it has some interest in or contacts with the case. The courts below in the instant case therefore correctly applied New York law.

Indeed New York could not constitutionally apply its public policy to refuse to enforce the Virginia limitation. In establishing broad guidelines for the States in choice of law matters, this Court has said, in *Richards* v. *United States*, 369 U.S. 1, 15 (1962):

> "Where more than one State *has sufficiently substantial contact with the activity in question*, the forum

> State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another State *having such an interest* in the multistate activity." [Emphasis added.]

This constitutional requirement that there be a substantial connection between the forum state and the subject matter or parties to the action as a prerequisite to the choice of the forum state's law or public policy was stated without qualification in Judge Kaufman's opinion in the *en banc* decision in *Pearson* v. *Northeast Airlines, Inc.*, 309 F. 2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963), a case in which the *Kilberg* doctrine was applied to a New York resident representing a New York decedent who took off on a flight from New York (309 F. 2d at 563):

> ". . . In the area of conflict of laws, the Due Process Clause prevents an arbitrary application of a state's jurisprudence to an out-of-state event. . . ."

Thus, not only does New York not apply its public policy to cases such as this, in which it has no interest, but it *could not* constitutionally apply that public policy in such cases.

II.

There is no conflict of decisions.

The petitioner asserts that the decision of the court below ". . . conflicts, in principle at least, with applicable decisions of this Court." (Petition, p. 9), citing *Klaxon Co.* v. *Stentor Electric Mfg. Co., supra,* and *Wells* v. *Simonds Abrasive Co.*, 345 U.S. 514 (1953).

The *Klaxon* case, of course, laid down only the principle

that federal courts sitting in diversity cases must apply the conflict of laws rules of the states in which they sit. That is precisely what the courts below did in this case: they applied the conflict of laws rule of New York as they interpreted it. As noted above, their interpretation was clearly correct.

The *Wells* case is also totally distinguishable and offers no support to the petitioner's position. *Wells* held that, while Pennsylvania must apply the substantive law of Alabama (*lex loci delicti*), it is not required by the Full Faith and Credit Clause of the federal constitution to apply features of the foreign law (e.g., statute of limitations) which have been traditionally regarded as procedural, despite subtle distinctions which would perhaps classify some statutes of limitations as substantive. No question of public policy was raised in that case, and there was no discussion of the requirement of the Due Process Clause that contacts exist between the forum state and the subject matter of the action before the public policy of the forum state may constitutionally be applied to an out-of-state cause of action. But in fact, as authorities in the field have pointed out, the forum state in *Wells* did have a substantial interest in the issue:

> "Pennsylvania, as the forum and the principal place of business of the defendant corporation, had a double interest in the application of its shorter limitation period: (1) an interest in safeguarding its judicial processes against claims and evidence rendered unreliable by the passage of time and (2) an interest in safeguarding local people and enterprises against stale claims founded on such unreliable evidence." Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 71 (1958).

New York has no contacts with or interest in the subject matter or parties in this action.

The petitioner does not claim that the decision below conflicts with decisions in any other circuit, and since it simply involves a question of New York law, such a conflict would rarely arise. But certainly other circuits have had no hesitation in applying foreign death limitations even where the policy of the forum state was strongly opposed to such limitations, and even where the forum state had substantial contacts with the action. *Goranson* v. *Capital Airlines, Inc.*, 345 F. 2d 750 (6th Cir. 1965) (involving the same accident as the instant case). And in *Tramontana* v. *S. A. Emprese de Viacao Aerea Rio Grandense*, — F. 2d — (D. C. Cir. June 10, 1965—not yet reported), 33 L.W. 2666, the United States Court of Appeals for the District of Columbia applied a Brazilian death damages limitation to a case involving a Maryland resident and arising out of an airplane accident in Brazil, because the District of Columbia had no contact with the issues, despite the District of Columbia's policy against death damage limitations.

The unanimity of the federal courts clearly demonstrates the lack of substance to the petitioner's arguments.

III.

No important constitutional issue or federal question is presented here.

The petitioner apparently claims that if New York (as in the *Kilberg* case) refuses to enforce a foreign death limitation in a case involving a New York domiciliary, the constitution compels it to refuse to enforce such a limitation in any case brought in its courts, regardless of whether New York has any connection with the issues.

The short answer to this contention is that, as this Court said in *Wells* v. *Simonds Abrasive Co., supra,* (345 U.S. at 516) the constitution ". . . does not compel a state to adopt any particular set of rules of conflict of laws", except that (as this Court clearly implied in *Richards* v. *United States, supra*), the constitution forbids a state to apply its own laws or policy to a case with which it has no contacts. Far from compelling New York to apply its public policy to this case, therefore, the constitution clearly forbids it to do so.

Petitioner's position is the extraordinary one that a plaintiff has the privilege of imposing upon a defendant that concept of "justice" which is most favorable to her, simply by choosing a forum whose concepts of justice coincide with her own, regardless of whether or not that forum has any interest in the action. In effect, she claims that forum-shopping is entitled to constitutional protection, a patently absurd proposition.

The petitioner's proposed rule, by which federal courts sitting in New York would apply New York public policy regardless of whether New York domiciliaries were involved or whether New York had any "contacts", would result in uninhibited forum-shopping which would be much worse than that which existed before *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938), when *Swift* v. *Tyson,* 41 U.S. (16 Pet.) 1 (1842), was the law.

CONCLUSION

The petition for a writ of certiorari should be denied.

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